IN THE SUPREME COURT OF ESWATINI

Case No. 08/2022

HELD AT MBABANE

In the matter between:

PUR INVESTMENTS (PTY) LTD **Appellant**

And

POWER PROJECTS (PTY) LIMITED **Respondent**

Neutral Citation: *Pur Investments (PTY) LTD VS Power Projects (PTY) Limited (08/2022) [2023] SZSC 24 (31st July 2023).*

Coram: **S.B. MAPHALALA JA, N.J.HLOPHE JA AND J.M. CURRIE JA.**

Date Heard: **29th MARCH 2023.**

Date handed down: **31st JULY 2023.**

Summary

Civil appeal - Lease with an option to purchase the property forming the subject of the lease concluded between the parties herein - Appellant purports to exercise the option to purchase which is disputed by Lessor who contends the lease contemplated a right of preemption as opposed to an option to purchase – The clause contained in the lease agreement talks of a 'an exclusive and sole option to purchase and preemptive right' being granted to the Lessee in the same sentence – The property comprising the subject of the option to purchase is defined as consisting of two properties, one of which it is common cause, had not been developed at the time.

In disputing the option to purchase in favour of the preemptive right, the Appellant seeks to use its development of one of the properties as proof that the agreement was unclear or ambiguous on what was being granted between an option to purchase and a preemptive right – Admissibility of such evidence becomes an issue before Court.

Whether the appellant had in law and the circumstances of the matter exercised an option or a preemptive right is a matter for interpretation of the contract – The principles of interpretation of documents and contracts have to be resorted to – Fate of the property in the light of the competing interests therefore has to be determined on the papers as they stand.

Interpretation of documents and contracts as a principle considered – Invalidity or otherwise of long leases concluded without them being notarized contrary to section 30 of The Transfer Duty Act considered – Whether couching of the option to

purchase clause in the manner done brought about an ambiguity or even a dispute of fact which necessitated that oral testimony be resorted to, considered.

At the instance of the Supreme Court in a previous sitting, the parties directed to consider and submit on the provisions and effect of both the Land Speculation Control Act 8 of 1972 and Section 211 (4) of the Constitution or (stet) the validity of the agreement relied upon, particularly if the Shareholders or a majority of them in the purchasing company are foreigners – The validity of the agreement in the context of its shareholding – Provisions of the Legislation in issue considered in an attempt to address the issues raised by the Court – Court comments on its having to hear issues not first considered by the court a quo.

Effect of section 211 (1), (4) and (5) of the Constitution on the exemption extended to an agreement relating to land situated at the Industrial Estate in Matsapha considered – Presumption against retrospective legislation considered – Distinction between retroactive and retrospective legislation considered – Presumption against taking away existing rights considered.

The principle is that the legislature does not intend to change the existing law more than is necessary – The legislature does not intend that which is harsh, unjust or unreasonable – According to section 23 of the Interpretation Act - A repeal of a legislation is not to affect its past operations including the rights that legislation accorded citizens.

JUDGMENT

HLOPHE JA

[1] This is an appeal from the judgment of the High Court per Maphanga J, in which he granted an application in terms of which the then applicant (now the respondent) sought an order of Court compelling the appellant (then the respondent), to transfer to the applicant two properties fully described as Plot no.588, Matsapha Industrial Estates, Matsapha, Manzini District, Measuring some 10521 square meters and Plot 726, Matsapha Industrial Estates, Matsapha, Manzini District, Measuring 7930 square meters, based upon the agreement in terms of which the then applicant (now the respondent), had to pay to the current applicant a sum of E26,000,000 (Twenty Six Million Emalangeni only). The order prayed for was granted by the court *a quo* on the basis that it was complying with a certain option to purchase agreement contained in a lease agreement concluded between the parties in that matter.

[2] The order further directed, as prayed for, that the transfer of the property to the then Applicant was to be carried out or effected within 7 days of the date of the grant of the order in question failing which the Sheriff or the Registrar of the High Court was to be thereby authorized and empowered to sign any and all documents, affidavits and/or power of attorney necessary to give effect to prayer one of the then Applicant's prayers so that it would be as good in law as having been done validly by the then Applicant. The appellant (then as

the respondent) was ordered to pay the costs of the proceedings, including those of Counsel as certified in terms of rule 68 of the rules of the High Court.

[3] Following its dissatisfaction with the judgment of the court *a quo*, the Appellant appealed to this Court, hence this judgment. The grounds of appeal relied upon by the Appellant are long and intricate. They are as follows:

3.1 The learned Judge a quo erred in law and in fact in not holding that the option contract is invalid and has no legal force or effect.

3.2 The learned Judge a quo erred in law and in fact in not holding that clause 22 of the lease agreement is void for vagueness and thus legally unenforceable in as much as it seeks to marry two concepts, (i.e. a preemption and an option to purchase) which are ordinarily mutually irreconcilable at law and have totally distinct legal consequences.

3.3 The learned Judge a quo erred in law and in fact in holding that the option clause is a distinct, separate, and stand-alone clause.

3.4 The learned Judge a quo erred in law and in fact in not holding that the option clause is a nullity in as much as it forms an integral part of the lease agreement in as much as the latter, being a long lease,

ought to have been notarially executed for it to be valid in terms of section 30(1) of the Transfer Duty Act, 1902.

3.5 The learned Judge a quo erred in law and in fact in placing reliance on South African cases and statutes in as much as these are not only inapplicable and devoid of extraterritorial application but are in fact at variance with the brand of Roman Dutch common law which our country received as per The General Law and administration Proclamation of 1907.

3.6 The learned Judge a quo erred in law and committed a gross irregularity in deciding this case on a point that was not raised and canvassed by the parties.

3.7 In view of the common cause fact that the invalidity point was raised as a preliminary alternative which would have had the effect of disposing of the entire matter if upheld, the learned judge a quo erred in law and in fact in holding that such a point constituted a "... radical departure completely contradictory to the respondent's main case..."

3.8 The learned Judge a quo erred in law and misdirected himself in that whilst professedly placing no reliance on the Supreme Court case of ***Orion Hotel and Resort v Piggs Peak Casino (PTY) LTD,*** *he effectively and practically applied the said case. In doing so the learned Judge erred in law in as much as the said case had no binding force regard being had to the fact that it went directly*

against at least two previous decisions of the same Supreme Court on the legal effect of Section 30 of The Transfer Duty Act on the validity or otherwise of long-term leases that have not been notarially executed. Maphanga J was duty-bound to apply these two previous decisions and not the ***Orion*** *case as the latter could only legally depart from them upon a clear demonstration in the judgment itself why they were not worth following regard being had not only to the common-law doctrine of stare decisis but also bearing in mind the constitutional imperative of section 146(5) Of the Constitution of 2005.*

3.9 *The learned Judge a quo erred in law and in fact in indirectly giving judicial status of approval to the deprivation of one's property otherwise than in terms of section 19 of the Constitution.*

3.10 *The learned Judge a quo erred in law and misdirected himself in overlooking the canon of legal interpretation which is equally "as old is the hills", to the effect that a court should not ascribe an interpretation to a legal document which leads to unreasonableness or it even imagining that any businessman worth his name could have enhanced the value of his property by effecting improvements on it well knowing such property has been made the subject of a sale.*

3.11 *The learned Judge a quo erred in law and in fact in holding that there was a valid sale notwithstanding the fact that there was no evidence to the effect that there had been compliance with all the*

laws covering the sale of landed property e.g. The Land Speculation Control Act, Section 211 (3) and (4) of the Constitution, the Companies Act etc.

3.12 *The learned Judge a quo erred in law and in fact in holding that the doctrine of estoppel is applicable on the facts of this matter.*

3.13 *The learned Judge a quo erred in law and in fact in generally evincing an attitude of partiality in favour of the respondent in this matter e.g. directing the property to be transferred within seven days of the delivery of the judgment despite the notorious fact that the applicant had at least four (4) weeks to make an appeal if it was dissatisfied with the judgment. This goes against the letter and spirit of fundamental fairness as prescribed by section 21 of the Constitution, regard being had in particular to the magnitude of the case.*

3.14 *The learned Judge a quo erred in law and in fact in holding that the property had to be transferred by the High Court Registrar in as much as such powers are vested in the Registrar of Deeds as a matter of statute i.e. The Deeds Registry Act.*

[4] The factual background to the matter as obtained before the court *a quo* and as it ended up resulting in the impugned judgment are as set out herein below:-

4.1 The Appellant and the Respondent concluded a lease agreement in terms of which the Appellant as the lessor, leased the two properties herein below described as Plot 588, 7th Street, Matsapha Industrial Estate, Matsapha, Manzini District and Plot No. 726, 7th Street, Matsapha Industrial Estate, Manzini District.

4.2 The lease in question was for a duration of 10 years with an option to renew for a further period of 5 years.

4.3 In clause 21 the lease provided for a right of first refusal which is also referred to as a right of preemption. The essence in this right is that it obliges the lessor to offer to sell the property first to the Lessee in the event of him choosing to sell the said property. The heading and the other sub clauses in this clause supported the notion of a right of first refusal or a preemptive right also known as a right of preemption.

4.4 In clause 22 the lease agreement provided, mainly and significantly, in terms of its heading and arguably its contents as well, for an **"option to purchase"**. Owing to the significance of this particular clause in the determination of this appeal, I have to capture as much of it as I consider relevant or appropriate.

"Option To Purchase

22. The Lessor and it's successors in title or assigns hereby gives and grants unto the lessee or its nominee the exclusive and sole option and preemptive right to purchase, during a period of 6 (six) months after the expiry of the first 5 (five) years of the initial renewal period of the lease, the "property", namely plot 588, Matsapha measuring in extent 10521 square metres and plot 726, Matsapha measuring in extent 7930 square metres for the sum of E26 000 000.00 (Twenty six million Emalangeni (rands) upon the following terms and conditions:- (underlining has been added)

22.1 Commencement

This option and preemptive right shall commence on 1 January 2020 and shall terminate at 16:00 on 30th June 2020 provided that should the lease be cancelled prior thereto for any reason whatsoever this option and preemptive right shall immediately likewise be cancelled or terminated."

4.5 I observe, as did Maphanga J in the court *a quo* that whilst referring to the sub clauses under clause 22, the option to purchase clause, 'that this section of the lease agreement proceeded to detail certain conditions that would come in to force and be applicable upon the Applicant's exercise of the option under the rubric namely, conditions of sale' including the mode of payment and conditions attaching to the purchase price, with the rest of the conditions pertaining to obligations as

to costs of transfer, the assumption of possession as well as liability of rates and taxes as well as conditions concerning warrants". I highlight one special provision within these conditions of sale which stands apart and is peculiar to an option to purchase and the sale consequential thereupon. It relates to a breach of the agreement and is to be found in clause 22.3 (h). It is otherwise known as the breach clause.

4.6 In the said breach clause, it is stated as follows:-

"(h) Breach:

In the event of the Lessee failing to fulfil, on due date, any of the terms and conditions of this 'option to purchase', if exercised by the lessee, then the Lessor or its agents hall have the right, on giving the Lessee fourteen 14 days' notice, in writing, by registered post, to fulfil any of the said terms and conditions and the lessee having failed to do so underlining has been added:-

- To cancel the sale by registered letter addressed to the lessee in which event the Lessee shall forfeit any monies paid to the Lessor or its agent in terms hereof without prejudice to the Lessor's other legal rights and remedies and the right to claim damages; or

- To claim immediate payment of the whole of the purchase price and the fulfillment of all the terms and conditions hereof.

4.7 On the exercise of the option to purchase, Judge Maphanga, observed the following as captured in sub clause 22.3 of the agreement bearing the heading set out herein below:-

"22.3 Exercise of Option

should the lessee wish to exercise this "option to purchase" the property it shall do so after 1st January 2020 by posting same at the Matsapha post office by the prepaid registered post addressed to the Lessor at P.O.Box 180, New Castle 2940 RSA" (underlining has been added).

[5] It is not in dispute that on the 13th May 2020, during the currency of the renewed lease, the Respondent wrote a letter to the Appellant in which it advised that it was exercising "the option to purchase" the property as offered it in terms of clause 22 of the lease agreement. The exercise of the option aforesaid by the Respondent was rejected by the Appellant, who denied that what the clause offered was an "option to purchase" the "property" as defined in that clause – which comprised plots 588 and 726 both situated on 7th Street, Matsapha, at the Matsapha Industrial Estates and measured respectively 10521 and 7930 square metres respectively. The Respondent contested the stance taken by the Appellant in rejecting the exercise of the 'option' by the Respondent, the lessee herein, which resulted in the latter instituting proceedings in the court *a quo*. The Appellant actually contended that the Respondent had been offered what was known as the right of first refusal or a right of preemption which could, in terms of the clause in question, only be exercised by the seller at the time, and for a price, of his choosing.

[6] In the proceedings in question, the Respondent prayed that the Appellant be compelled by an order of court to transfer ownership of the property forming the subject matter of clause 22 upon it (the Respondent), paying the sum of E26, 000,000.00 (Twenty Six Million Emalangeni). Further prayers entailed the request that the Sheriff, or the Registrar of the High Court, was being authorized and empowered to sign any and all documents, affidavits, and/or power of attorney necessary to give effect to prayer one, as validly and effectively as would be done by the Respondent's representative. The Appellant was ordered to pay costs of the proceedings.

[7] It is easy to tell that the matter did not turn much on facts than it did on law. The main issue was what exactly did clause 22 provide for between an 'option to purchase' and a 'preemptive right', also known as a right of preemption or the right of first refusal. In a wide ranging and well-articulated judgment, the court *a quo* found that the clause in question was not ambiguous and that it provided for an 'option to purchase' as opposed to a right of 'preemption' (also known as a preemptive right or a right of first refusal). The Court went on to effectively grant the orders as prayed for.

[8] The Appellant noted an appeal in terms of which it contended that the court *a quo* had erred in deciding the matter in the manner it had done. The notice of appeal had some fifteen or so grounds which formed the basis of the appeal. Although the said grounds were long and intricate, they were all trying to say that the court *a quo* erred in finding that the contentious clause 22 of the Lease Agreement provided for a preemptive right rather than an option to purchase.

In the alternative they were saying that the said clause was vague and or ambiguous. They were further contending that the whole agreement was void and therefore of no force or effect for not complying with section 30 of the Transfer Duty Act.

[9] The good starting point should be a definition of the two contentious legal terms mentioned in clause 22 of the lease agreement which are namely an 'option to purchase' and a 'preemptive right' (the right of first refusal). There is no dispute between the parties over what these terms mean in law.

[10] In the case of an option to purchase, the seller binds himself by way of a separate contract, generally contained in the main one (in this case the lease agreement), to keep an offer open for a fixed or ascertainable period. In such a case the offeree is said to have an option for that period. The sale is concluded when the offer is accepted by the buyer which is referred to as an exercise of the option to purchase. The distinction between an ordinary offer and an option is in that whereas an ordinary offer may be revoked prior to its acceptance by the offeree, an option is not revocable. It remains open until accepted by the person in whose favour it was made, which must itself happen within the period for which the option was granted. The option maybe exercised (accepted) even if the person who granted it purports to withdraw it. Since an option is a contract, it must like all contracts comply with all the requirements applicable to a contract in general. See **Robert Sharrock's** book titled, **Business Transactions Law, 9th Edition, Juta, page 271**. See also

A.J. Kerr's, The Principles of the Law of Contract, Sixth Edition, Lexis Nexis, Butterworths, pages 82- 84 and 671 - 672.

[11] A preemptive right on the other hand gives to the other party, the grantee of that right, what is known as a right of first refusal should the grantor of that right wish to sell the property forming the subject matter of that preemptive right to a third party. Besides having granted to the grantee of that preemption the right of first refusal, the grantor of the said preemption, retains the right to decide whether or not to sell that property except that if he decides to sell it, it must first be offered to the party granted the preemptive right. The price at which to sell and the time within which it may be exercised, need not be fixed as at the time the preemptive right was granted. On the foregoing definition of a preemptive right, the Court was referred to the following passage from the judgment in **Owswianick V African Consolidated Theatres (Pty) LTD 1967 (3) SA 310 (A) at 316.**

> *"The grantor of a right of preemption cannot be compelled to sell the subject of the right. Should he however decide to do so, he is obliged to, before exercising his decision to sell, to offer the property to the grantee of the right of preemption upon the terms reflected in the contract creating the right."*

[12] Although the court *a quo* ended up having to decide several legal points, it is an undisputed fact that the issue at the heart of the matter is as hinted above, the meaning and effect of clause 22 of the Lease Agreement signed between the Appellant and the Respondent, namely whether what it granted

was a preemptive right (right of first refusal) or an option to purchase. As indicated above, the clause in question, although it bore the heading; "Option to Purchase", in capital letters, the contents of the clause did not make what it was granting that obvious between an option to purchase and a preemptive right. This is because, as shown where the clause is captured in full above, it stated the following in its material part (with the material words being emphasized):-

> *"The lessor and its successors in title or assigns hereby gives and grants unto the Lessee or its nominee, the* ***'exclusive and sole option and preemptive right to purchase...."***

[13] The stand point of the Appellant was that the said clause, despite the words "exclusive and sole option..." it, because of the added words thereto namely "and preemptive right to purchase", granted the Respondent as the grantee a preemptive right as opposed to an option to purchase. The Respondent on the other hand contended that the clause granted it the opposite of what the Appellant claims, and that is that, it granted her an option to purchase. A process to find or ascertain a true meaning of the clause in question had to therefore be embarked upon. It followed that several legal issues had to be considered and or be determined in order to come up with the true meaning of the clause, particularly with regards what it granted. Although the court *a quo* concluded that what the clause granted was an 'option to purchase' and not a 'preemptive right' (also known as a right of first refusal), the Appellant did not accept that conclusion and instead, believing that the court *a quo* had erred, it noted the current appeal.

[14] The legal issues that the court *a quo* had considered and determined in its quest to decide the matter involved the following:-

- The alleged invalidity of the lease agreement and by extension the option to purchase, owing to the parties alleged failure to notarize the lease agreement as a long lease in line with the provisions of section 30 of the Transfer Duty Act.

- The interpretation of clause 22 of the Leese agreement so as to determine which one of the two concepts of 'option to purchase' and that of a 'Preemptive Right' provided for applied in the matter.

- The contention that the central question could only be decided after the Court would have heard oral evidence, given that the real issues were shrouded in a dispute of fact which could only be determined through either the hearing of oral evidence on a specific issue as referred to oral evidence by the Court seized with the matter or through a referral of it to trial.

- The need for the alleged rectification of the contract of lease given the allegations that as it stood, it was at variance with the alleged true intention of the parties.

[15] I now turn to the individual issues the court *a quo* had had to consider and determine resulting in it deciding the matter in the manner it did. These issues are set out immediately above.

- **The invalidity of the lease agreement and its alleged similar effect on the option contract.**

15.1 Although the record of proceedings reveals that this point was raised much later in the proceedings and after all the other issues had long been disclosed in the papers, with some of them having already been submitted upon, I note that the court *a quo* had to deal with it in its judgment as a preliminary one because of the likely effect it would possibly have on the matter, particularly if upheld. That is to say, it would be dispositive of the matter such that the Court would not need to deal with the others.

15.1.1 The thrust of this point was that in terms of section 30 of the Transfer Duty Act, the option contract, in so far as it was an inextricable part of the long term lease which contained it, was invalid because the said section provided that a long term lease, which the one containing the option was, had to be notarized first for it to be valid and enforceable. The section concerned it was argued specifically provided that such a lease was invalid if it was not so notarized.

15.1.2 The court *a quo* disposed off this point by firstly having to ascertain if in fact the option contract in terms of clause 22 of the lease agreement did in law form a part of the long term lease it was contained in. It came to the conclusion that in terms of existing authority, the option contract was viewed as an independent contract from the main agreement, the long term lease herein. At paragraphs 19 - 23 of its judgment; the court *a quo* said the following:-

"*19 From the clear provisions and arrangement of the content of the written agreement, the ineluctable conclusion is that the exercise of the option to purchase the property embodied and incorporated into a lease agreement gives rise to the creation of yet another contractual tier – a sale of land. Conceivably a series of contracts might come into play when dealing with an option; there being the option itself, the main contract to which it is accessory and a substantive derivative contract with its own set of terms, conditions as well as obligations when that option is exercised. That is the essence of the applicant's case here. It proceeds on the basis that its exercise of the option triggered and brought into force a sale of land agreement in regard to which it seeks to hold the respondent.*

20. The underlying issue arising from the Respondent from its alternative ground is whether if certain formalities are required for the creation of the main contract, those

should by default be transposed to the ancillary contract of option. This issue was alluded to in a South African Appellate Court case in ***Hischowitz V Moonlman 1985 (3) SA 739,*** *where the Court opined orbiter that in general a pactum de contrahendo such as an option contract is required to comply with the same requisites for validity including the requirements as to form applicable to the main contract to which the parties have bound themselves. That is the essence of the respondents' contention in this case. The* ***Hirschowitz*** *position however marked a departure from the position taken by the Courts regarding this question in that jurisdiction in a line of earlier decisions of the High Court in that country from Brandt V Spies 1960 (4) SA 14 (E) at 16 - 17 to Rogers V Phillips 1985 (3) SA 183 at 187.*

21. *The statement in the* ***Hirschowitz*** *(supra) case has also been called into question and were it more than orbiter, would have been laid to rest and overruled in a recent Constitutional Court decision,* ***Mokone V Tarros Properties CC and Another [217] 25,*** *where it was held that a right of preemption being accessory to a lease did not have to comply with the formalities prescribed in the alienation of land Act. An issue that arose before the Court in the* ***Mokone*** *case was whether the right of preemption complained of contained in a written lease agreement was renewed when the lease was extended and whether an*

endorsement by the parties extending the lease on the fact of the lease agreement had to also be subjected to the invoked legislative requirement and the prescribed formalities contained under section 2 (1) of the Alienation of Land Act.

22. *The cardinal principle which in my view runs as a thread through these South African cases and the instant matter is that of severability of the accessorial agreement to the main contract. The corollary principle is that if an option is a contract in its own right (albeit collateral) but distinct and separable from the lease why should it be affected by the formalities attendant on the main contract (the lease) to which it is ancillary? The authors, Dale Hutchison et al also take the same position as has now been affirmed in the* ***Mokone*** *case, in their work, The Law of Contract in South Africa.*

23. *The upshot is that the application of these principles to the facts and circumstances leads to the conclusion that on account of the option provisions and the derivative sale of the property envisaged in the said option, [is that upon] the exercise of the option by the Applicant, the option contract and the sale of land are unaffected by any defect or want of compliance as alleged relating to*

the main agreement (lease). It is indefeasible on the basis contended for by the Respondent."

15.2 I agree fully that the foregoing excerpt captures the correct position of our law. One is also bolstered in its correctness by the fact that it not only is legal but it is also logical and sound, for indeed if the option contract is a complete contract although contained in the main agreement, it would not make sense why it must be affected by those defects which affect the main independent lease agreement. I therefore find no erring on the part of the court *a quo*.

15.3. The other aspect on which the invalidity argument was based was that even assuming the attack was not from the point of view of the severability of the option contract, it still would not be applicable because if on the one breath the Appellant was seeking to enforce the same contract, mainly through the rectification counter application it had moved, it would have had to be estopped from claiming it was null and void because it would be approbating and reprobating at the same time, conduct that the law does not countenance. It worsened it in his case that the Appellant had for over 10 years relied on the same contract and received rentals based on the same lease agreement, it would be difficult for him in law to turn around and seek to deny the existence of that same contract.

15.4 It would be difficult how, in the circumstances and in the face of what we now know as revealed in the papers and from the conduct of the parties themselves, it would be possible to find fault in the court *a quo's* determination of the matter. Consequently this challenge of the contract between the parties as being invalid can also not succeed.

- **The Interpretation of clause 22 of the Lease Agreement so as to determine which one of either the 'option to purchase' or the 'Preemptive right' is meant by clause 22 of the Lease Agreement.**

[16] I agree that the thrust of the current dispute between the parties in this matter is in the ascertainment of which one of the two competing concepts referred to above, clause 22 really provided for. This goes together with determining whether this ascertainment can be achieved from merely using the cannons of interpretation to interpret the said clause or it indeed calls for a referral of the matter to oral evidence as argued by or on behalf of the Appellant. The concepts referred to herein are of course those referred to above as either an option to purchase or a preemptive right. It complicates it that whilst the Applicant contends that the clause provided for a preemptive right (also known as the right of first refusal), the Respondent contends otherwise. The Respondent contends that the clause provides for the option to purchase. The Court *a quo* was of the following view on this aspect:-

"16.1 After considering the matter, it concluded that there was no ambiguity in the clause, and that when taking everything into

account, it was obvious the clause provided for an option to purchase. The question that we have to try and answer in this appeal is whether the court *a quo* was correct in deciding the dispute concerned in the manner it did.

16.2 The position of our law on interpretation of contracts, legislation and other important documents has been the subject of numerous judgments of this Court and of those beyond this jurisdiction. The process of interpreting contracts, legislation or other related documents so as to ascertain their true meaning was described in the following words in **Natal Joint Municipal Pension Funds V Endumeni Municipality 2012 (4) Sa 593 (SCA):-**

"Over the last century there have been significant developments in the law relating to the interpretation of documents, both in this country and in those that follow rules similar to our own. It is unnecessary to add unduly to the burden of annotations by trawling through case law on the construction of documents in order to trace those developments. The relevant authorities are collected and summarized in ***Bastian Financial Services (PTY) LTD V General Hendrick Schoeman Primary School****. The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document be it legislation, some other statutory instruments, or contract, having regard to the context provided by reading the provision or provisions in the light of the documents as a whole and the circumstances attendant*

upon its coming into existence. Whatever the nature of the documents, consideration must be given to the language used in light of the ordinary rules of grammar and syntax, *the context in which these appear; the apparent purpose to which it is directed and the material known to those provisions responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or one that undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what the Judge regards as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or a statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the provision and the background to the preparation and production of the document."* (Underlining has been added)

16.3 The Court was addressed at length by counsel who sought to clarify that interpretation is no longer just context based but that a number of other issues are considered, which is what the Endumeni case advocates for . It was submitted that the hitherto

stand point in the South African Supreme Court of Appeal that the Court in interpretation only looks at surrounding circumstances when there is an ambiguity in language, is no longer consistent with the approach to interpretation now adopted by the South African Courts in relation to contracts and other documents, such as statutory instruments or patents. The submission went further to contend that the approach taken now is that interpretation is one unitary exercise. See in this regard the statement made in the case of **Norvatis SA (PTY) LTD V Maphil Trading (PTY) LTD 2016 (1) SA 518 (SCA) para. 28** to the effect that:-

"A Court must examine all the facts – the context – in order to determine what the parties intended. And it must do that whether or not the words of the contract are ambiguous or lack clarity. Words without context mean nothing."

16.4 In this submission Respondent's counsel says at paragraph 12, 13 and 14 of his heads:-

"12. It is clear from the clause itself that it relates to an option to purchase. From the agreement as a whole the context in which the agreement was concluded and the circumstances in which the agreement was concluded, that the parties could never have intended that clause 22 would also relate to a right of first refusal as does clause 21. To interpret the clause in the way the Appellant contends it should be, would result in a patent absurdity and fly in the face of the rules of interpretation. It would also make no

commercial sense or common sense and would plainly be contrary to the intention of the parties when they concluded the agreement.

13. *The heading of the clause makes it clear what the clause is about, "Option To Purchase".*

14. *As is pointed out by the Learned Judge a quo in paragraph [10] of his judgment there is one special provision within the conditions of sale which stands apart and is peculiar to the option to purchase and consequential thereupon. This relates to breach and is to be found in clause 22.2 (h)*: (it is important to note that whereas the Court *a quo* identified the clause in question as clause 21.2 (h), it is clear when one looks at the lease agreement itself that that assertion as it relates to the numbering of the clause is erroneous. The reality is that there is no clause 21.2 (h) in the text of the agreement but there is clause 22.2 (h). That clause indeed covers a breach to an option to purchase clause):-it reads;

"(h) Breach

In the event of the Lessee failing to fulfil on due date any of the terms and conditions of the ... then 'option ***to purchase'*** *if exercised by the Lessee..."*

[17] I agree that the above analysis of the circumstances by the Respondent herein confirms that clause 22 refers to an option to purchase as opposed to a

preemption when considered in its proper context, including the words used. There is also the provision of clause 22.3 of the agreement which spells from its heading what its purpose is, and it spells it out clearly as giving direction on how the option is to be exercised which is clearly giving effect to clause 22 by providing the subheading as the 'exercise of option'. There can be no doubt that the option referred to, is that disclosed in clause 22 which is the option to purchase. Sub clause 22.3 forms part of the said clause 22 which from its heading is undoubtedly about an option to purchase. In its original form it is couched as follows:-

> *"22.3 Exercise of option.*
>
> *Should the lessee wish to exercise the 'option to purchase' the property ... (underlining and emphasis have been added).*

[18] The judge *a quo's* finding in paragraphs 37 to 39 of his judgment can therefore not be quibbled. It is to the effect that the clause in question refers to an option. This is how the paragraphs in question are framed:

> *"37. There are two features to the agreement text that warrant comment in relation to the respondent submissions in its contentions for interpretation. This is so in so far as it appears the respondent seeks to rely thereon as basis for the supposed ambiguity in the preemption and option elements of contract. The first is alluded to by the Applicants heads at paragraph 6.1 being the proximity and sequence of the preemption rights and option clauses – clauses 21 – 22. The second I have already mention arises in light of the rather casual association of the option and right of first refusal*

aspect in the wording of clause 22. It is the conjugation of the words 'sole option and preemption rights' occurring in clause 22 that is the cause of this association or perceived confusion. For the reasons I have already given the second cited effect is actually overplayed and exaggerated by the respondent. It is simply unsupported.

38. *In the context of clause 22 as much as in preceding clause 21 it becomes evident that reference to the preemptive right was an unnecessary surplus age and that in fact it is inaccurate and inconsistent with the rest of the text in that the letter of the provision clearly relates to the right of option and not preemptive right. I cannot agree with the Messers Kennedy et Maziya's contention that we cannot 'impute to the language of the text any tautology or superfluity without reason even where, as in this case in point the tautology is plain for everyone to see. The reference to the African Products case is therefore misapplied in this case. I therefore cannot accept the argument that the combination of 'option and preemptive right' gives rise to any complexity as to the meaning. I think the conflation ascribed to the applicant to these terms by the respondent is unfounded. It is rather the respondent who seeks to conflate these concepts and the relative obligation to which they relate.*

As I have already state above the placement of the fight of preemption and the option clauses in succession in the instrument is purely incidental as these elements of the main agreement are conceived as separate and clearly delineated

section. And also as stated the alleged ambiguity or confusion that the respondent has cited as basis for its grounds for its rectification counter – application is neither legally sound or sustainable.

39. The proposition of the supposed ambiguity or alleged intention to construe clauses 21 and 22 as only relating to a right of first refusal which is conditional or contingent on the respondent's willingness to sell the property to the applicant at a stipulated price of E26 000,000,00 is also untenable. It is an extraordinary proposition especially because the parties went so far as not only broadening the scope of the clause as to the subject matter to relate to both plots but is also very specific and pointed as to the price they determine and fixed in their minds. No intention or purpose as to the insertion of clause 22 and its concomitant purchase conditions could be more clear."

[19] From the meaning of the two terms or concepts as set out in their description above, it is clear that the context of their entire agreement is consistent with an option to purchase as pointed above. It is only too obvious that merely because of the words added after the mention of what was being granted in clause 22, namely an "exclusive and sole option" the added words being "and preemptive right," it would not change the above stated conclusion when appreciating that a preemptive right cannot be exclusively enforced by the grantee of such a right who is the lessee herein. It is only an option to purchase which can be so enforced.

[20] Argued Appellant's counsel, the clause could only have meant a preemptive right because one, those words did appear when the agreement was signed which means that is what reflected the consensus of the parties when they concluded the agreement. It was because of this consensus the appellant claimed, that it went on to improve the other plot, that is plot 726, Matsapha, which together with plot 588, Matsapha, Industrial Estate, comprised the 'property' which formed the subject of clause 22. After the agreement had been concluded, it was construed by this court and the court *a quo* that the Appellant's argument cannot be correct.

[21] On the first leg it cannot be correct because it has been shown that the option to purchase aspect fulfils all the conditions consistent with it and for this very reason and since the two cannot co-exist as it is only the option to purchase which can always be exercised anytime within the agreed period by the grantee of that right, with the preemptive right being only exercised if the grantor of that right was willing to sell at a time and at a price he chooses. Clearly this is not the tone of the agreement concluded by the parties herein.

[22] A preemptive right being provided by clause 22 would also not have been conceivable when considering that the agreement was very clear on the deliberate clause that it provided for an option to purchase. It was in clause 21 where even the heading pronounced that it was about a right of refusal. (A preemptive right) Common sense is such that the two clauses which follow each other could not have possibly had to provide for one thing; namely the

right of first refusal as the Appellant contends, where each one has its own specific heading.

[23] The Appellant's counsel tried to bolster his contention that clause 22 provides for a preemptive right because Appellant had much development put into the initially undeveloped plot forming part of the leased property in the lease agreement (that is on plot 726, Matsapha Industrial estate). He argued that that conduct of Appellant was consistent with it having granted Respondent a preemptive right over the properties concerned as it could not realistically have improved property that was to be alienated. The reality is that there was no prior agreement on any intended improvement and the effect it was going to have on the apparent option to purchase granted the Respondent over the same property. If it was done only after the agreement granting the option to purchase had already been concluded, it cannot in law be used to justify the meaning to be attached to the contentious clause. I agree with the Respondent that to use the improvements effected well after the conclusion of the agreement to justify what it was meant for is tantamount to using inadmissible evidence to enhance a party's position. The law does not allow it. We were referred to a passage by **Christie** in his book, under the tittle, **The Law of Contract, 6th Edition, at page 225**. It is there provided that:-

> *"Circumstances arising after the signature to the contract are, of course, irrelevant".*

Reference was also made to the case of **Krige V Walls 1990 (3) SA 724 (C) 739 H – 740 (C).**

[24] In **Breed V Van der berg 1932 AD 283 at 292 to 293** it was stated that:-

> *"But evidence of the construction put on the contract by one party is not admissible, nor is evidence of the parties' subsequent conduct admissible to prove their common interpretation of an unambiguous contract which differed from its plain meaning unless there is a claim for rectification".*

[25] In Briscoe V Deans 1989 (1) SA 100 (W) 105 B the position was captured in the following words:-

> *"As I understand the law, evidence of subsequent conduct in respect of a contract which is unambiguous would be inadmissible, save by consent of the parties, without a claim of rectification."*

[26] The foregoing position was confirmed as well in Telcordia Technologies incorporated V Telkom SA LTD 2007 (3) SA 266. It was there stated:-

> *"The rule is that evidence of subsequent conduct is admissible, even if the agreement is on its face unambiguous, if the parties "by consent lead such evidence. (Underlining has been added).*

[27] The situation set out in the foregoing excerpts from some South African judgments was clarified earlier in **Van der Merwe V Jumpers Deep Limited 1902 TS 201 at 207** where the position was stated in the following words:-

" Evidence of the parties' subsequent conduct in order to prove their common intention at the time of making the contract must be distinguished from evidence of subsequent events showing that the contract has worked out unfairly, which is never admissible"

[28] It is not in dispute that when the matter served in the court *a quo*, the Appellant brought a counter application attempting to rectify the problem observed in clause 22 of the Lease Agreement. Although that application was dismissed on the basis that in the eyes of the court *a quo* it had to be estopped because it was trying to rely on an agreement it was itself despising, thus approbating and reprobating. In the matter before Court it is apparent that there was even a more plausible ground to dismiss the application. The Appellant brought the proceedings in question in an attempt to try and bring new evidence, after the conclusion of the agreement to show that it was allegedly unfair. As already shown, that was inadmissible because there was no evidence showing that it was a common intention of the parties that the clause in question should reflect a preemptive right or a right of first refusal nor is there any evidence of a previous agreement to that effect. There was also no evidence of an agreement to that effect. Clearly the rectification claim was brought in an attempt to render inadmissible evidence of the subsequent conduct of the Appellant admissible. This is however not permitted in law.

- **Effect of the heading to a clause in the agreement.**

[29] It is important to comment on the effect of the Heading of the clauses or paragraphs. Several clauses of the agreement bears certain headings or

subheadings. Clause 22 for instance bears the heading "OPTION TO PURCHASE", which is in capital letters.

[30] In **Chatabhai V Union Government (Minister of Justice) and Registrar of Asiatics 1911 AD 13 at 24**, the court expressed what has been referred to as the traditional liberal view point when it said the following:-

> *"The headings of different portions of a statue may be referred to for purposes of determining the sense of any doubtful expression in a section ranged under any particular heading."*

[31] In **Turffontein Estate LTD V Mining Commissioner, Johannesburg 1917 AD 429** the court commented as follows with regards the effect a heading on a clause or paragraph or section has:-

> "We *are therefore fully entitled to refer to it for elucidation of any clause to which it relates. It is impossible to lay down any general rule as to the weight which should be attached to such headings. The object in each case is to ascertain the intention of the Legislature, and the heading is an element in the process."*

[32] It has been said that this reasoning reflects a purposive approach to interpretation and is preferable to the mechanical approach inherent in the literal method which only permits reference to headings in cases where ambiguity or doubt is present. According to Innes CJ, it was the intention of the Legislature which was paramount and not mere clarity of words.

Paragraph 25 of the Respondent's Heads of Argument said as much. Innes CJ went on to observe at page 64:

> *"Where the intention of the lawgiver as expressed in any particular clause is quite clear, then it cannot be overridden by the words of a heading. But where the intention is doubtful, whether doubt arises from ambiguity in the section itself or from any other consideration, then the heading may become of importance. The weight to be given to it must necessarily vary with the circumstances of each case."*

[33] I agree with the submission by Respondent's counsel that the learned Judge *a quo* was correct in not having regard to the unnecessary and meaningless words "...and preemptive right", added to the words "...exclusive and sole option to purchase..." in clause 22 of the Lease Agreement which was, as the heading to it confirmed, about an option to purchase. The Court was further referred to the following passage by **E.A. Kellaway** in his book under the tittle, **Principles of Legal Interpretation of Statutes, Contracts and Wills** at page 163:

> *"Where a Court has to choose between two inconsistent sections or provisions or between two portions of a proviso in a section of one Act and both are clear in themselves, but mutually destructive,(as for example where it was provided that certain trading licences issued... 'to have force and effect for the current year 1931 and for the half year ending 30th June 1931), the Court said in the case of* **R V Brener 1932 OPD 45 -57,** *that it is proper in the first place to eliminate that*

set of words against which, for instance, a presumption exists, or which is less in harmony with the intention of the law-giver as gathered from the section read as a whole or from the statue as a whole"

Secondly, in view of the presumption against forfeiture of right and the presumption against doing a palpable injustice and in view of the intention appearing from the proviso itself, to preserve rights under existing licences (in the example), the proper cause is to ignore the words by which the exemption of existing licences would be cut short on the 30th June 1931 and give effect to the rest of the proviso. In other words, where there are two inconsistent sets of words in a provision and one or the other of these sets is insensible, the insensible one must be eliminated.

- **Alleged Disputes of fact.**

[34] The Appellant's contention that the matter should have been referred to oral evidence because of the alleged disputes of fact is untenable. The Court was faced with a question of interpretation of the specific clause of the contract than that of the admissibility or otherwise of some evidence which the Appellant wished to place before Court. The relevant facts and surrounding circumstances were all common cause. There was therefore no evidence if any dispute why the matter should have been referred to oral evidence. The Appellant's argument that the application by the then Applicant should have been dismissed on the ground that the wrong type of proceedings were dealt with earlier on, should have been instituted instead. It is not supported by the material before Court, because as pointed out the problem in the clause concerned was more a matter for interpretation than it was one where oral evidence had to be led.

[35] I have already determined why the point on the invalidity of the agreement and by extension the clause in question cannot stand and that point is herein reiterated.

[36] Having reached the stage I have in this judgment, it is imperative that I turn to the aspect of the matter that the parties have dealt with at the direction of this Court. It is specifically recorded that on the 10th November 2022, this Court, then constituted differently from how it now is, issued the following order:-

> *"1. The Respondent is ordered to file with the Registrar and serve on the Appellant the full names, nationality or citizenship of all the shareholders of the Respondent, together with the respective number of shares held by each shareholder in the Respondent as on the 10th day of January 2015.*
>
> *1.1 The Respondent is ordered to file and serve the information or material as referred to in 1 above on or before the 09th December 2022.*
>
> *2. The parties, if so advised, may supplement their papers in respect of Section 211 (4) of the Constitution, 2005 and the Land Speculation Control Act, 1972.*
>
> *3. The matter is postponed to the next session to a date to be arranged by the Registrar of the Supreme Court."*

[37] Although the Respondent had been ordered to supply the information required as well as to supplement its papers around the provisions of section 211 (4) of the Constitution of 2005 and those of the land Speculation Control Act, of 1972, on or before the 9th December 2022, the Respondent had not acted in line therewith.

37.1 It eventually provided the information required by the Court under cover of the supplementary affidavit filed and served on the 3rd February 2022. An explanation given for that was brief and concise; namely that the affidavit in question was meant to be deposed to by the then, and now late, Managing Director of the Respondent, Reiner Stucky, who was at about that time taken ill, having allegedly been diagnosed with terminal cancer. He eventually succumbed, which paved a way for the deponent to the Supplementary Affidavit concerned, one Leon Stucky, to depose to the affidavit. In this affidavit the deponent also sought condonation for the late filing of the said affidavit and put forward as a reason for the delay in filing the affidavit as ordered by the Court, the ill health of Reiner Stucky alluded to above together with its consequence as embodied in the death of Renier Stucky. He said nothing about their prospects or otherwise in the matter.

37.2 The Appellant took issue with this in it's opposing affidavit, contending that the Respondent had failed to comply with the time limits as fixed by the Order of Court; and was in default in that regard for about two months. It was contended that when it finally filed and served the information required together with a

supplementary affidavit; it had failed to meet the requirements of condonation as it should have first sought. The Appellant contended that the Applicant had not given a reasonable explanation on why it failed to file the affidavit and the required information in time. It had also failed to disclose its prospects of success in the matter. It was contended those two requirements, the Respondent as a defaulting party was obliged to meet for it to attain condonation for its shortcomings.

37.3 This Court notes that the law governing the seeking of condonation in this jurisdiction is settled. That positon was stated in the following words in **Terror Maziya V The Attorney General, Civil Appeal Case No. 66/2020:-**

"16. It is well settled in this jurisdiction that as soon as a litigant becomes aware that compliance with the Rules of Court will not be possible, she should invoke Rule 16 without delay and lodge an explanation for extension of time, setting forth good and substantial reasons for the Application.

17. Similarly , it is well settled in this jurisdiction that an application for condonation should be made as soon as the litigant realizes that the Rules of Court have not been complied with. Negligence on the part of the litigant's attorney will not exonerate the litigant. The general principle of our law regarding condonation is that whenever a

prospective Appellant realizes that he has not complied with the rules of Court, he should, apart from remedying his default immediately also apply for condonation without delay..."

37.4 Stating what the contents of the said affidavit should disclose, with regards the requirements of a condonation application, the Court said the following in paragraph 30 of the **Terror Maziya vs The Attorney General Judgment** (*supra*):

"30. Notwithstanding the legal position in South African law, it would seem that the preponderance of legal authority in this jurisdiction, holds the view that a party seeking condonation for non – compliance with the rules of Court should satisfy two essential requirements.

Firstly, he must give a reasonable explanation for the delay. This encompasses the degree of delay involved in the matter as well as the adequacy of the reasons given for the delay. Secondly, he must show on a balance of probabilities that there are reasonable prospects of success in the merits. Accordingly it is trite law that a litigant seeking condonation for non – compliance with the Rules of Court cannot rely solely on prospects of success, without giving a reasonable explanation for the delay. The two essential requirements for 'sufficient cause' should be satisfied before condonation is granted".

37.5 The question is whether in the present matter, it can be said that a case has been made towards the condonation of the failure to file the supplementary affidavit as directed by the Court earlier. The starting point here is an acknowledgement that the Respondent's failure was not that of failure to comply with the rules as such than a failure to comply with a Court directive. It could take the form of contempt of Court than that of failure to comply with the provisions of the rules of court. In that sense it would perhaps require the Respondent to purge its contempt than to seek condonation strictly speaking. The reality is that in purging such contempt, the Respondent would be required to give an explanation for the alleged unbecoming conduct.

37.6 If I am correct in approaching the matter in the manner I do, I am very much doubtful it can be argued that the required explanation was not made where the Respondent contends that the required affidavit together with the documents for the information sought by the Court could not be filed in Court because the person meant to dispose to the affidavit could not do so because he was taken ill, from which illness he was to later succumb. It seems to me that such an explanation may suffice in a matter like the present and it may suggest lack of sympathy in a situation where much more is required, to seek a better explanation than that. I, in any event, take cognizance of the fact that none of the parties suffered real prejudice as a result. I should

therefore, in exercise of the discretion this Court has, allow the affidavit and related information to be admitted.

37.7 Even if I was to be found not to be correct in approaching the matter in the manner I have, it is a fact that the Court has a discretion to exercise on whether or not to allow the affidavit concerned to be filed in the circumstances of the matter given that each matter turns on its peculiar facts. I do not think that the Respondent would be required to state prospects of success in a matter where the Court had *mero moto* asked it to file certain documents and it failed to do so in time because of some tangible explanation. I believe that it would be upon the Court having heard the explanation given for the delay to exercise its discretion in favour of the Respondent and allow the filing of the information it had ordered be availed.

37.8 The point being made here is that from the peculiar facts of the matter, particularly the explanation that the information required to be filed necessitated that it be done under cover of a Supplementary Affidavit, which filing was delayed by the illness and subsequent death of the intended deponent, it would be very hard if not impossible not to accept the Respondent's request to condone the failure to file within the specified time.

37.9 We would therefore in exercise of the Court's discretion allow the filing of the said affidavit and the information previously required by the Court.

[38] The case put forward by the Respondent in its merits is that the initial shareholding in the Respondent company was a result of a sale of shares agreement concluded by the current shareholders in the Appellant, the Rodriguez; and two family trusts known as the Reiner Family Trust and the Tucker Family Trust. A decision was later taken where Reiner Stucky on the one hand and Richard Tucker on the other hand, took over and acquired the shares from the Rodrigues in their personal capacities. The purchasers of the shares by Stucky and Tucker, discovered they could not work together which resulted in Tucker pulling out of the deal, whilst Reiner Stucky remained as the sole shareholder in the company.

[39] After acquiring the shares in the said company, the company had to operate in the premises it had been occupied under the old shareholdership. In those premises it was to carry out the franchise operations of Mercedes Benz and Mitsubishi motor vehicles. These were to be carried out on warehouse No.3, Plot No.588, 7th Street, Matsapha Industrial Estate, Matsapha. According to the Respondent it was a condition precedent of Reiner's acquiring the shares in the said company that the Appellant as the owner of the property, was to lease the premises to the Respondent with a right to eventually buy the property. It was allegedly for that reason that the agreement of lease concluded had to have an option to purchase.

[40] As concerns the Land Speculation Act No. 8 of 1972 ("the Act"), the Respondent said it has been advised that the purpose of that Legislation was to provide for the control of land speculation transactions involving persons who were non-citizens of Eswatini and matters incidental thereto.

[41] Section 2 of that Act defined a control transaction to mean the sale, transfer lease, mortgage exchange or other disposal of land to a person who is not a citizen of Eswatini, or a company that is not a private company or cooperative society all of whose members are non-citizens of Eswatini, or a person listed in the schedule to the Act. A control transaction also refers to the issue, sale, transfer, mortgage or other disposal of or dealing with any share in a private company or cooperative society which for the time being owns land in Eswatini, or with a person who is not an Eswatini citizen.

[42] Section 8 of the Act provides that a control transaction shall be void unless the land Speculation Control Board has granted its consent to that transaction in accordance with the Act.

[43] At the time the agreement was concluded Reiner Stucky was allegedly a citizen of the Republic of South Africa. His attempt to obtain citizenship in Eswatini became elusive for some time until the 12th January 2023, when his status as a citizen of Eswatini was acquired. It was however not disputed that when he acquired the shares in the Respondent company, Mr Stucky was a South African citizen and not that of Eswatini.

[44] The First Schedule to the Act, provided for an exemption to the land or shares. This exempted land is the one situated at the "Matsapha Industrial Estate, or on any other Industrial Estate or Township, approved by the Minister in writing for the purposes of these regulations".

[45] It was submitted that the property forming the subject of the dispute between the parties in the matter was situated in the Matsapha Industrial Estates and was therefore exempted from the provisions of the Act and as such the land Speculation Control Act was not applicable to the transaction concluded. In other words the sale of the property in question was not to be taken to be invalid and or to be of no force or effect on account of the company purchasing it being owned by shareholders who were non-citizens in Eswatini.

[46] Although section 8 of the Act had so provided, there was Regulation 3 of the Regulations to the Act which provided that the exemption in question did not exempt anyone from the provisions of section 14 to the Act. That section provided that for a non-citizen of Eswatini to be exempted from the provisions of the Act, he must have applied for exemption to the Land Speculation Control Board within three months of acquiring ownership of the property in question. The argument by the Appellant was that the Respondent had not made that application with the result it could not benefit from the said exemption as it had not so applied. The Respondent denied that and instead maintained that it had not at that point acquired ownership of the land in question which the matter before court was about anyway. It argued that section would only become applicable at the end of the proceedings, and even

then if they would be concluded in its favour. It was in any event premature for the Appellant to raise that objection because the authority to grant or reject such a request would have to be the Land Speculation Control Board and not the Court.

[47] I agree with the Respondent. It cannot realistically be held to have failed to apply to the Land Speculation Control Board because there was never concensus on it acquiring ownership of the land concerned because as soon as it had purported to exercise the option, the Appellant refused to acknowledge that as having occurred and insisted the section provided for something else, namely the preemptive right. It would therefore amount to double standards for the Appellant to, whilst on the one hand it denied there had been the exercise of an option by the Respondent (which would make it acquire ownership), to on the other hand want to argue that the Respondent had in fact acquired ownership of the property forming the subject matter of the dispute when it was challenging the very exercise to make it acquire ownership. In that sense the Appellant was blowing hot and cold at the same time or was approbating and reprobating at the same time, which is conduct the law does not countenance. In any event it was correct that whether the exemption would be allowed after application was going to be a matter for the Land Speculation Control Board to consider in line with the applicable law and its procedures.

[48] Consequently, I cannot agree that the Respondent cannot acquire exemption for the land in question and that it can no longer apply for one because it is

out of time to do so. I am convinced those would be matters for the appropriate structure or body to consider.

[49] With regards the Constitution of Eswatini, it was clarified that whereas there was section 211 which provides that:-

> *" 211 (4) Subject to subsection 5, all agreements the effect of which is to vest ownership of land in Swaziland in a non – citizen or a company the majority of whose shareholders are not citizens shall be of no force and effect unless that agreement was made prior to the commencement of this constitution.*
>
> *(5) Provided that a provision of this chapter may not be used to undermine or frustrate an existing or new legitimate business undertaking of which land is a significant factor or base"*

[50] The Respondent submitted that on a prior interpretation, the agreement which, is the subject of this application was not void ab initio, but that it was the land Speculation Control Board on application, that would decide whether or not to grant an exemption in terms of section 211 (5). In other words it was the one to decide whether upholding subsection (4) would, in a set of given facts, amount to undermining or frustrating a business like that of the Respondent herein. It was again becoming a matter for determination by the appropriate authority, which has not yet done so.

[51] It was submitted further that the practice in Eswatini was that a company owned by foreign shareholders seeking to acquire land in this country, was required to make application to the Land Speculation Control Board, which decides whether or not to grant that application, taking into account its obligations. It was contended therefore that whether or not to approve the transaction was not for the Court to decide but was a matter for the Board in exercise of its discretion.

[52] Respondent's counsel submitted further that this Honourable Court did not have to deal with this appeal on the basis of the provisions of the Land Speculation Control Act but had to confine itself to whether or not there was an option to purchase. If that question was determined in favour of the current Respondent, it was then up to the said Respondent to apply for the exemption in terms of Section 211 on the grounds that land was a significant factor or base to its operations.

[53] It was argued further by the Respondent that it was therefore premature for this Court to raise the questions of the provisions of the Land Speculation Control Act and Section 211 of the Constitution. These issues, it was submitted, were issues for the Land Speculation Control Board and or the Land Management Board to deal with, and not for this Court's invention at this time.

[54] To further elucidate the position, the current Respondent emphasizes the significant role played by the land in its operations or business. It could not

operate without access to the warehouses, which were specially designed to enable it carry out its business. It said that it was for that reason that after purchasing the shares in the company; it found it imperative that the lease agreement be concluded as well so that it could have premises to operate in. The Mercedes Benz and Mitsubishi motor vehicle dealerships it operated insisted on certain specified requirements which included the nature of the workshop from which its vehicles would be serviced or repaired from. There was therefore a great need to retain the said premises as it was the only way the business the Respondent was acquiring was going to function. This underscored the fact that land is a significant factor or base for the business to be operated.

[55] Lastly, it was contended that the fact of the shareholders of the current Respondent being foreigners did not advance the Appellant's case because the land in Matsapha was exempted from the provisions of the Land Speculation Control Act No. 8 of 1972. It also did not advance the Appellant's case because, in terms of Section 211(5), the provisions of Section 211(4) could not be used to undermine or frustrate the existing or new business undertaking as the land is significant to its existence.

[56] The Appellant on the other hand contends as set out herein below in reaction to the directive by this Court as well as in reaction to the case of the Respondent in that regard. It observed that the Respondent's case was reliant on schedule one to the Land Speculation Control Act 8/1972 which exempted

the location of the property forming the subject of the dispute between the parties from the provision of the Act.

[57] In its contention although it was regulation 3 of the Regulations to the Land Speculation Control Act of 1972 which allowed or authorized the minister to exempt land from the provisions of the Act, that exemption was not to be deemed to exempt any person from complying with the provisions of section 14 of the Land Speculation Control Act no 8 of 972. Effectively Section 14 of the Act provides that a noncitizen, must within 30 days of acquiring ownership of land notify the Land Control Board of the said ownership.

[58] As regards the provisions of the Constitution, it was submitted that it provided in Section 211 (1) that from the date of its commencement, all land, including existing concession land, in Eswatini was going to continue vesting in the Ingwenyama in trust for the Swazi Nation as it vested on the 12th April 1973. It was submitted that the transaction at the heart of these proceedings was concluded after the date of commencement of the Constitution and that therefore the exemption was rendered irrelevant in law when the Constitution effectively repealed the Land Speculation Control Act - supposedly because the exemption relied upon by Respondent had happened prior to the coming into effect of the Constitution, so much so that when it came into effect with a clause like Section 211(1), it was allegedly nullifying the exemption granted by the Land Speculation Control Act.

[59] The exemption was allegedly rendered irrelevant in law by virtue of section 211(1) of the Constitution as read with Section 211 (4) and Section 211 (5) of the Constitution. Section 211 (4) in a nutshell provides that subject to subsection (5) all agreements having the effect of vesting ownership of land in Eswatini in a non-citizen or in a company having non-citizens forming a majority of its shareholders, shall be of no force nor effect, unless that agreement was made prior to the commencement of the Constitution. This however, was to be subject to subsection (5) of Section 211 of the Constitution. Subsection (5) provided that, no provision of that chapter of the Constitution could be used to undermine or frustrate an existing or a new legitimate business undertaking of which land was a significant factor or base.

[60] It was argued on behalf of the Appellant that section 211 (5) did not even arise because there were several violations which allegedly rendered the transaction of no force or effect. These sections were identified as section 35 of the Competition Act No. 8 of 2007, section 8 of the Land Speculation Control Act of 1972, Section 14 and 15 of the Land Speculation Control Act of 1972.

[61] It warrants an immediate comment that the Section of the Competition Act 8 of 2007 referred to above - section 35 - is repeatedly referred to in the Appellant's case. It is worthy of note that the said Act cannot be considered in these proceedings for a number of reasons. It is only mentioned for the first time before the Supreme Court and during an instance when the issues to be

considered were specifically covered in the order this Court issued and sought answers on of which the Competition Act was not one of them. The pieces of legislation to be considered were clearly spelt out in the order. They were section 211 of the Constitution and the Land Speculation Control Act of 1972.

[62] The thrust of the said sections was the validity or otherwise of the transaction of the sale of the property concerned on account of the citizenship or otherwise of the majority of the shareholders of the purchasing company. Owing to the Competition Act being distant from the legislation specified in the court order, taken together with the fact that the other party had not been given an opportunity to react fully to the issues raised and the fact that it was being raised as a matter of first instance before the Supreme Court when it does not have original jurisdiction, I took the view that it was to be prejudicial to the other side and therefore that it not advisable to have it entertained in these proceedings and at this stage.

[63] I must say that this concern was raised during the hearing of the appeal and it was my understanding it had been accepted as it was not to be persisted on. In fact the Respondent did not react to it at all as it took the view that it was a crucial matter of its own, which required full preparation and that it had to be raised before a Court with first instance jurisdiction. For these considerations the point involving the Competition Act having been raised for the first time on appeal and outside of the issues specifically directed to be considered by this Court, is not to be considered.

[64] When it comes to the provisions of the Land Speculation Control Act 8 of 1972, it cannot be denied that the land forming the subject matter of the dispute between the parties was exempted from the provisions of the Act concerned by the relevant Minister. The effect of this exemption is that the provisions of section 8 of the Act which render an agreement vesting ownership on the land in question upon a non-citizen or upon a company where a majority of the shareholders are non-citizens, invalid.

[65] Although there is section 14 of the Act which provides that there should be the reporting of a transaction vesting ownership of land to the Land Speculation Control Board within 30 days of the acquisition of such ownership, I agree with the Respondent that this particular section has not taken, or could not take effect herein because the Respondent's status as a purchaser of the property is still under consideration here in Court. It shall be remembered that the thrust of the dispute between the parties was a challenge whether the Respondent did exercise an option to purchase given the fact that the Appellant maintains that the clause in question envisaged a preemptive right.

[66] As regards the alleged invalidity of the transaction forming the subject matter between the parties from the point of view of section 211 (1), (4) and (5) of the Constitution I agree with the position taken by the Respondent. As regards the contention that the commencement of operation of the Constitution of Eswatini brought with it the annulment of the exemption of the land at the Matsapha Industrial Estate, I agree that this contention triggers

the various presumptions against the annulment of the said exemption. These were captured in the Respondent's heads of argument as the presumption against retrospectivity, the presumption against the taking away of rights, the presumption that the Legislature does not intend to alter the existing law more than is necessary and the presumption that the Legislature does not intend that which is harsh , unjust or unreasonable.

[67] On the presumption against retrospectivity we were referred to the following passage from professor **G.E. Devenish's** work, under the tittle, **Interpretation of Statutes, at pages 186 to 194,** specifically at page 186-187, where the respected writer states:-

> ***"8.1 Introduction***
>
> *The underlying ideological motive for this presumption is to ensure that justice is done to the individual, but there is also a practical consideration for its application, which is elucidated by Du plesis who observes that 'the operation of statutes is in the nature of things delimited by time and space, and it would therefore, as a rule, make little sense either to prohibit or to permit what has been done "in the past". In general our courts have not construed the presumption mechanically but perceptively thereby ensuring that the law is as justly and reasonably applied as the elasticity of the language used in a statute permits. The presumption has a universal element about it, finding expression in Roman and Roman – Dutch law as well as being applied in both the English and the continental legal systems.*

Thus in ***Von Weiligh V The land and Agricultural Bank of South Africa*** *the Court held that the '...rule is both of English and Roman Dutch Law that a law is presumed not to be retrospective, unless such was clearly the intention of the Legislature'.*

The Presumption against the taking away of rights.

"An analysis of the relevant case law indicates that [there are] two cognate presumptions involved: one [is] against retrospectivity and the other [is] against taking away vested rights. The latter also finds expression in section 12(2) (c) of the (South African) interpretation Act"

[68] The Respondent's Counsel submits that the wording of section 23 of our (Swaziland's) Interpretation Act of 1970, is identical to the wording of section 12 of the South African one, the Interpretation Act 33 of 1957. The said section 23 of our interpretation Act of 1970 provides as follows:-

"23. Repealed Law not to affect its past operations

Where a law repeals another law in whole or in part, then unless the contrary intention appears, the repeal shall not –

(a) Revive anything not in force or existing at the time at which the repeal takes effect.

understand to be retrospective. That is not the case. The question is whether a certain provision as to the content of leases is addressed to the case of all leases or only of some, namely, leases executed after the passing of the Act. The question is as to the ambit and scope of the Act and not as to the date as from which the new law, as enacted by the Act, is to have been the law".

[70] Dissecting the contents of the foregoing as reflecting both a retroactive and retrospective scenario, the writer said the following on the distinction between the two:-

"A retroactive statute is one that operates backwards, that is to say, it is operative as of a time prior to its enactment. It makes the law different from what it was during a period prior to its enactment.'

With regards a retrospective statute it says the following:-

"A retrospective statute changes the law only for the future, but it looks to the past and attaches new prejudicial consequences to a completed transaction...a retrospective statue operates as a past time in a sense that it opens up a closed transaction and changes its consequences, although the change is effective only for the future".

[71] The position was made much clearer by the statement attributed to Goldstone J as captured in Professor G.E Devenish's book titled , **Interpretation of Statutes** between pages 186 – 194 , as referred to in Respondent's Heads

[74] Whilst Section 211(4) of the Constitution on its face appeared to be proving that all agreements vesting ownership of land on non-citizens or on companies where the majority of shareholders were non-citizens were to be of no force or effect in law, the immediate subsection there to in Section 211(5), clarified that the said subsection was not to be used to undermine an existing or a new legitimate business undertaking of which land was a significant factor or base.

[75] I have no doubt that in interpreting the provision, it was not to automatically follow that simply because a purchaser of land happened to be a non-citizen or a company in which a majority of the shareholders were non-citizens then that agreement was necessarily void. I agree that that determination will be left for the appropriate authority in the name of the Land Speculation Control Board or its successor in title. It in my view is the only body that can satisfy the requirements of Section 211(5) with ensuring a legitimate business was not being undermined or frustrated in rendering the agreement of that sale of land void. For our present purposes I cannot say it has not been shown that the business of the Respondent, conducted at the premises comprising the subject of the dispute between the parties herein, has land as a significant factor or base.

[76] I otherwise agree that whether or not to render the agreement between the parties of no force or effect would be a matter for the Land Speculation Control Board and not for the court.

[77] Accordingly I am of the view that there is no merit in the contention that the agreement of purchase of the land forming the subject of this matter between the Appellant and the Respondent can be said to be invalid or to be of no force or effect.

[78] Consequently, and for all the above reasons, I have come to the conclusion that the Appellants appeal cannot succeed. It is dismissed with costs which are to include those of counsel as envisaged by Rule 68 of the High Court Rules.

N.J. HLOPHE
JUSTICE OF APPEAL

I Agree.

S.B. MAPHALALA
JUSTICE OF APPEAL

I Agree.

J.M. CURRIE JA
JUSTICE OF APPEAL